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FATHER'S ALIENATIONS AND AFTER-BORN SONS.

Certain broad expressions of Lord Blanesburgh in *Lal Bahadur* v. *Ambika Prasad*[1] lend themselves to the view that the familiar law on the matter has been overturned (*see* 50 M.L.J. (N.I.C.), pages 3 and 4). And it is well, therefore, to take stock of the law, if we are to re-assure ourselves that there has been no such overthrow or revolution. Some day, the Judicial Committee themselves may give us that re-assurance (in whole or in part), as they did in *Brij Narain's case*[2] with respect to Lord Shaw's judgment in *Sahu Ram's case.*[2a]

Now, the first step to take, is to consult the statement of the law as made by text-writers of eminence; and the next step would be to consult the pronouncements of the Supreme Tribunal.

Mr. Mayne and his editor Sir Murray Coutts-Trotter state the law in precisely the same way as does Sir D. F. Mulla. For simplicity's sake, the following citation is made from Sir Mulla's book: The only preliminary observation that need be made is that a son born subsequent to the date of the alienation in question but conceived prior to that date, ranks as a 'prior-born' son, but the burden of proving that the son was born or conceived before the date of the alienation in question, is clearly on the person pleading such prior birth or conception. (*Sabapathi* v. *Somasundaram*[3] and *Venkata Subba Raju Garu* v. *Gatham Venkatrayudu.*[4])

1 (1925) L.R. 52 I.A. 443. I.L.R. 47 A. 795 (P.C.)
2 (1923) L.R. 51 I.A. 129. I.L.R. 46 A. 95 46 M.L.J. 23 (P.C.)
2a (1917) L.R. 44 I.A. 126 I.L.R. 39 A. 437. 33 M.L.J. 14 (P.C.)
3 (1882) I.L.R. 16 M. 76 2 M.L.J. 244. 4. (1914) 27 M.L.J. 580

Says Sir Mulla: "An alienation made by a father, there being no male issue in existence at the date of the alienation, is valid, though made without legal necessity. . . But an alienation made by a father who has sons then living, without legal necessity, is invalid, if made without their consent. Such an alienation may be set aside not only at the instance of those sons, but at the instance of any son born after the date of alienation, unless it has been ratified by them *before* his birth." (*See* Mulla's Hindu Law, 6th Ed., p. 308.) The cases quoted by Sir Mulla in support of the above proposition are: *Hurodoot* v. *Beer Narain*,[5] *Tulshi Ram* v. *Babu*,[6] *Bhup Kunwar* v. *Balbir Sahai*[7] and *Dwarka Das* v. *Krishan Kishore*.[8] (See also *Hasarimal Babu* v. *Abani Nath*[9] and 45 M.L.J. (N.I.C.), page 17.) If the son in existence at the date of the sale was a minor at the time, he could not consent to the sale and the father could not be held to have consented on behalf of the son. Thus the sale would rank as one made without the son's consent. (*Bhup Kunwar* v. *Balbir Sahai*[7] and *Subbarami Reddi* v. *Ramamma*.[10])

Next, we may consider three decisions of the Privy Council relevant to the question on hand. The birth of the after-born son does not create a fresh cause of action or a new starting point of limitation for setting aside the father's improper alienation. *Ranodip Singh* v. *Parmeshwar Prasad*.[11] Equally clearly, the after-born son is entitled to an equal share in any joint family estate that may be recovered by his prior-born brother consequent on proceedings impeaching the father's alienations: *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*[12]; *Venkata Row* v. *Tuljaram Row*[13] on appeal from *Ganesh Row* v. *Tuljaram Row*.[14] (*See* Mayne, para. 287, as to the recovery of ancestral property from despoilers not claiming under the family.)

The circumstance that in the case last cited the Board (differing from the High Court) found that the father's alienation was not binding even on his own share, and accordingly directed that the shares of the members should be fixed as at the date of the dissolution of the joint family, only makes the case similar to a case under the Mitakshara law as interpreted in Bengal and the United Provinces, or to a case of gift of co-

5 (1869) 11 W.R. 480. 6. (1911) I.L.R. 33 A 654
7 (1921) I.L.R. 44 A. 190.
8. (1921) I.L.R. 2 Lah 114 at 119, 120
9 (1912) 17 Cal L.J. 38 10 (1920) I.L.R. 43 M 824.
11. (1924) L.R. 52 I.A. 69. I.L.R. 47 A 165. 48 M L.J. 29 (P C).
12. (1913) L.R. 40 I.A. 213: I.L.R. 40 C. 966 25 M.L.J 512 (P C).
13. (1921) L.R. 49 I.A. 91: I.L.R. 45 M. 298 43 M.L.J 298 (P C).
14. (1913) 26 M.L.J. 460 at 463, 466, 467.

parcenary property which (with limited exceptions) is void *in toto* according to the Mitakshara law all over India. If the alienation were found to be binding on the father's share, it would of course bind his share as on the date of the alienation. (*Chinnu Pillai* v. *Kalimuthu Chetti*[14]) And if the father were to become the sole survivor of the joint family, the equitable doctrine of "feeding the estoppel" (embodied in S. 43 of the Transfer of Property Act) might operate in favour of the alienee for value (*Venkata Row* v. *Tuljaram Row*[15]). The birth of a son subsequent to that point of time might not prejudice the alienee.

The following language of the Board is most helpful to the present discussion. They say: "Two further sons were born to Rajaram Row before the case came on for hearing on remand; and as they were also members of the joint family with their father and the plaintiff, they were added as defendants and are the 3rd and 4th respondents on these appeals. . . . At the present time the joint family continues; the joint family finds that this is a portion of the joint family estate which has been improperly alienated, and *which they are entitled to recover.*" The joint family comprising the after-born sons are entitled to recover the estate improperly alienated; and the suit brought by the prior-born son is not for his personal benefit, but it is to remove a common injury to the family estate.

The law relating to suits by reversioners furnishes a useful analogy The Privy Council have laid down that under O. 1, R. 1, Civil Procedure Code, the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. As a general rule, such suits must be brought by the presumptive reversioner; but, under certain circumstances, the next presumable reversioner would be entitled to sue. There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff, or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioner to sue: *Venkatanarayana Pillai* v *Subbammal.*[16]

If an after-born remote reversioner (by his next friend) can be accorded a right of suit, an after-born son ought not to

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13 (1921) L.R 49 I.A 91: I.L.R. 45 M 298· 43 M.L.J. 298 (P C.)
15 (1911) I.L R 35 M 47: 21 M L J. 246 (F.B).
16 (1915) L R, 42 I,A. 125: I.L R. 38 M 406 28 M.L.J. 535 (P C)

be denied such a right. In both cases, the cause of action is the common injury to the estate; and the "after-birth" furnishes no new cause of action and no new starting point of limitation.

As to the possibility of ratification by the son, it may be asked, why should his consent be less effective after the birth of another son? The reason presumably is that on his birth the after-born son acquires a vested interest in the family estate and in the right to avoid improper alienations. Some analogy may be found in section 200 of the Contract Act which runs thus: "An act done by one person on behalf of another, without such other person's authority, which if done with authority, would have the effect of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect." By omission to impeach the father's alienation within the statutory period, both the sons might lose together the alienated property; but beyond that, the after-born son shall not suffer by reason of any positive consent given subsequent to his birth, though such consent might bind the share of the consentor and might even be presumptive, though rebuttable, evidence of the reasonableness and propriety of the father's alienation.

Now as to Lord Blanesburgh's judgment in *Lal Bahadur* v. *Ambika Prasad*[1] In that case, the impeached sale was made by the grandfather and the grand-uncle of the plaintiffs (respondents) in order chiefly to discharge two "antecedent mortgage debts" incurred by the alienors so early as 1895, when plaintiffs' father was but 13 years old, their uncle was but 3 years old, and they themselves were still unborn. The plaintiffs' father was alive when the suit was brought in 1919 The Board found that "all the circumstances in connection with the (disputed) sale were throughout known to the father and the uncle of the respondents, who neither of them at any time, although now supporting the respondents in these proceedings, themselves took any steps to impeach the sale on any ground." On those facts, the Board dismissed the action of the plaintiffs; and neither Mayne, para. 342, nor any one of the group of cases of which *Tulshi Ram* v. *Babu*[6] is a type, was cited before the Board.

The following expressions in the judgment of Lord Blanesburgh arrest attention: "In 1895 plaintiffs were still unborn. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to

1. (1925) L R 52 I.A 443· I.L.R. 47 A 795 (P C).
6. (1911) I.L.R. 33 A. 654.

an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated . . . . Was the sale-deed of 1904 binding on the respondents as having been made for the benefit of the family and for payment of antecedent debts? Was it any the less binding upon them even if the mortgages were not antecedent debts, seeing that these mortgages were both of them unchallengeable by the respondents? . . . The effect of the case of *Brij Narain* v. *Mangal Prasad*[2] is to show that in the circumstances of this case both of the mortgages of 1895 were 'antecedent debts' which would justify for their liquidation a sale of family property not otherwise improper. *In the present case, however, it is not, in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden* pro tanto *of these encumbrances, cannot be successfully attacked by those so bound. It follows that, in their Lordships' judgment, the sale in question is valid as against the respondents.*" In the same strain are the words "If the respondent Adita Prasad was not born at the date of the sale-deed, that deed is binding upon him, and the suit impeaching it, so far as he is concerned, cannot be maintained."

Can it be, that by the above expressions, the Board have virtually repealed a course of decisions which were not cited before them, which extend over 60 years, and which have been treated by eminent text-writers as sound and settled law. (*Cf.* the comments in *Arumugham Chetti* v. *Muthu Koundan*[17] on *Sahu Ram's case,* and the comments in 43 M.L.J. (N.I.C.), p. 7 on *Venkata Row's case.*) No doubt, in *Ranodip Singh* v. *Parmeshwar Prasad*[11] the Privy Council have held that an after-born son is not entitled to the extended period provided for by sections 6, 7 and 8 of the Limitation Act; and that is because, by the express terms of the sections, this extended period can only be claimed by a person entitled to institute the suit *at the time from which* the period of limitation is to be reckoned. But in *Lal Bahadur* v. *Ambika Prasad*[1] do the Privy Council mean to go further and hold that the *only* sons that can question the father's alienation are those in existence at the time of the

1. (1925) L.R. 52 I.A. 443: I.L.R. 47 A 795 (P.C.).
2. (1923) L.R. 51 I.A. 129: I.L.R. 46 A 95: 46 M L J. 23 (P C.)
11 (1924) L.R. 52 I A. 69: I.L.R. 47 A. 165: 48 M.L.J. 29 (P C)
17 (1919) I.L.R. 42 M, 711: 37 M.L.J. 166 (F B).

alienation, and that if they do not choose to question, no after-born son can?

In any case, the judgment cannot be deemed to have negatived the right of the after-born son to make common cause with his prior-born brothers, and along with them to bring or defend suits concerning their father's improper alienations; and his right to an equal share in any relief or compensation that may be obtained by his prior-born brothers in respect of such improper alienations,—that right also cannot be deemed to have been negatived by Lord Blanesburgh. Those rights have been guaranteed to the after-born son by the decisions of the Judicial Committee in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*[12] and *Venkata Row* v. *Tuljaram Row*.[13]

K.C.G.

CRITICAL NOTE *

ON

RAGHO *v.* ZAGA EKOBA, (1928) I.L.R. 53 B. 419: 31 Bom. L.R. 364.

To the lawyers of civil litigation the question of validity of disposition of property by a manager of an infant member of the family or a Hindu widow or the shebait of a temple or a trustee for necessity or benefit of the estate, is always one of high importance, and there is not an year or a month when the Law Reports and journals of India do not publish one or the other case of the kind, with reference to Hindu Law. Ever since July, 1856, when the well-known case of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonveree*[1] was decided by the Privy Council down to this day, numerous judgments have been delivered on the point by various Benches of the High Courts in India, either following or distinguishing or dissenting from each other. The Privy Council has had its share, though it has been consistently adopting its own view laid down in *Hunoomanpersaud Panday's case*,[1] but in spite of this, the uncertainty of law continues to this day. The case under notice is an illustration of it.

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12. (1913) L.R. 40 I.A. 213: I.L.R 40 C 966: 25 M.L.J. 512 (P.C)
13. (1921) L.R. 49 I.A. 91 I L R. 45 M 298: 43 M L.J. 298 (P C)

*By Mr Rochaldas Karamchand, Pleader, Sukkur

1. (1856) 6 M.I.A. 393.

Their Lordships of the Privy Council were perfectly justified in avoiding to give a precise definition to the expressions "necessity" and "benefit of the estate" and also in characterising them as general and elastic terms and in allowing Courts to remain free to judge of their nature, according as circumstances required.

In *Ragho* v. *Zaga*[2] the Division Bench of the Bombay High Court constituted by Justices Patkar and Murphy have held that the benefit of the estate for supporting an alienation must be of a protective character. The necessity, they were of opinion, involves some notion of pressure from without, and they also held that the benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return and would not imply vast powers of management which amount to an authorization to embark on speculative ventures.

While holding so, the learned Judges have discussed various authorities and Hindu texts (*Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree*,[1] *Palaniappa Chetty* v. *Sreemath Devasikhamani*[3] relied on, *Ganap* v. *Subbi*[4] and *Shankar Sahai* v. *Bechu Ram*[5] followed, *Nagindas* v. *Mahomed Yusuf*[6] distinguished, *Jagmohan Agrahri* v. *Prag Ahir*[7] and *Jado Singh* v. *Nathu Singh*,[8] dissented from) and referred to several others.

With due deference to the learned Judges of the Bombay High Court, it is submitted, the view propounded by them is erroneous, and not supported by the very Privy Council decisions on which they have relied the most. It would not be wrong to say that the pronouncements of their Lordships of the Privy Council have been misread by them. And the case of *Shankar Sahai* v. *Bechu Ram*,[5] which they were pleased to follow, was no good law then, it having been overruled by *Jagat Narain* v. *Mathura Prasad*[9] quite six months before the date of the delivery of their judgment.

I shall now proceed to discuss the various rulings quoted above and a few more relevant to the point herebelow, and make an humble venture to show that the above decision is not sustainable in law and facts. In order to appreciate this, it is

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1 (1856) 6 M.I.A. 393 at 423.
2. (1928) I L.R. 53 B. 419.
3. (1917) L.R. 44 I A. 147: I.L.R 40 M 709 : 33 M L J. 1 (P C).
4. (1908) I.L.R. 32 B. 577.
5. (1925) I.L.R. 47 A. 381.
6 (1921) I.L.R 46 B. 312.
7. (1925) I.L.R. 47 A. 452
8. (1926) I.L.R. 48 A. 592.
9 (1928) I.L.R. 50 A. 969 (F.B.).

very necessary to state the facts of the case under notice in some detail.

In the village of Shelave in the Parola Taluka, District Khandesh, there lived a joint family of a father and a minor son. The latter inherited the property in suit from his mother, who had in her turn inherited it from her own mother. His father was managing it—the land could not be farmed directly and being in possession of persons, who had no permanent interest in it, it was let to strangers at the low rental of Rs. 40 per annum. The minor and his father lived at Datana in Shindhkot Taluka *about thirty miles* away from Shelave. The boy's father finding it inconvenient to manage the property, sold it away for Rs. 1,500 along with one house of his own for Rs. 500 on 22nd November, 1918, and purchased from the sale proceeds thereof, Rs. 2,000, another land at Datana, measuring 13 acres, which yielded to them an annual income of Rs. 225. No sale-deed was passed by the purchaser but its possession was actually transferred to the minor's father.

The minor brought this suit in November, 1923, for a declaration that the sale-deed of 22nd November, 1918, was not binding on him, and for possession and mesne profits. Both the Lower Courts held that the sale in favour of defendant 1 by the plaintiff's father was for the benefit of the minor and binding on him on the ground that, the plaint land, situated inconveniently to them, as it was, was not yielding an income of more than 40 rupees, and, on the other hand, by virtue of the arrangement referred to above, the income produced was Rs. 225, which brought to the minor alone, to his proportionate share, more than four times over, in addition to that allowed to him as being the son of the father. The second appeal was rejected summarily by Justice Percival, but when the matter came under Letters Patent, before Justices Patkar and Murphy, they reversed the findings of all the three Courts.

Now let me take up the case-law.

In the earliest case (*Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree*[1]) a mortgage was executed by a Ranee in her character of a guardian of her infant son and manager of his estate. The money borrowed was utilized in payment of the arrears of revenue due to the Government in respect of these estates, and the property saved from sequestration. On the alienation being impeached, in the Privy Council, Lord Justice

1. (1856) 6 M.I.A. 393.

Bruce thought it right to state certain general principles for future guidance and observed as hereunder (*vide* page 423 of the report):

"The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power It can only be exercised in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

At page 424 the Lord Justice continues and remarks:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance, for the benefit of the estate But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money"

The passages quoted above have been referred to, and relied upon in numerous judgments and it is indubitably the source of the law on the point. Here we have a clear and an unambiguous direction to the effect that the power to charge an estate can arise "in case of need" *or* "for the benefit of the estate" and it also arises when the charge is one that a prudent owner would make in order to benefit the estate, and the elements to be considered are—

"The actual pressure on the estate, the danger to be averted *or* the benefit to be conferred on it in the particular instance."

The disjunctive letter "*or*" is being italicised with a view to show that the benefit to the estate would by itself be a justification for creating a charge. Nowhere is there a limitation prescribed by the highest Tribunal that there need be necessarily an element of "danger to be averted." Therefore the restricted view that the transaction "must necessarily be of defensive character" cannot stand. *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree*[1] has been reiterated by the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lal*[10] which holds that the same principles apply to the case of sales.

The next case of importance on the point is that of *Palaniappa Chetty* v. *Sreemath Deivasikhamani*[3] decided by the Privy Council in about 1917. In that case the shebait of a temple had disposed of the temple property of a stable and safer nature

1 (1856) 6 M.I.A. 393

3. (1917) L.R. 44 I A. 147 I.L.R. 40 M. 709: 33 M.L.J. 1 (P.C.).

10. (1874) L.R. 1 I.A. 321.

with a view to getting capital to embark in the money-lending business (I.L.R. 40 M. 719) and it was not established that there was any necessity for the grant or that benefit accrued to the charity estate. Under those circumstances their Lordships set aside the alienation and observed:

"It is impossible to give a precise definition of it (benefit to the estate) applicable to all cases, and they do not attempt to do so"

"The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation, these and such like things would obviously be benefits."

And later on their Lordships remarked:

"The difficulty is to draw the line as to what are in this connection to be taken as benefits and what not."

These apparently are the observations from which the theory of the Bombay High Court Judges originates, and on which they mainly rely in arriving at the conclusion shown above.

It is submitted, the illustrations given above are not, in the first place, exhaustive, and the very use of the word 'obviously' by their Lordships of the Privy Council just before the instances quoted above, is not an indication of the idea that they were the only ones that justified an alienation.

The learned Judges have fully followed *Ganap* v. *Subbi*,[4] their dictum being exactly the same as in *Ragho* v. *Zaga*,[2] any comment therefore on it would be superfluous.

And the next case followed in the case was *Shankar Sahai* v. *Bechu Ram*.[5] It was a suit to set aside the alienation of property which was effected by the manager with a view to secure money to meet the pre-emption case, and the Allahabad High Court refused to confirm the sale on the ground that there was no necessity nor was the said alienation for a purpose of defensive character, which alone could, in the view of the Judges presiding, be a justifying cause for transfer of property by the manager. It is strange that this ruling was referred to with approval by Justice Patkar though it was no good law then, it having been already overruled authoritatively by the Full Bench of the same High Court in *Jagat Narain* v. *Mathura Prasad*.[9]

The most relevant of the cases quoted and discussed in the case under notice were *Jagmohan Agrahri* v. *Prag Ahir*[7] and *Jado Singh* v. *Nathu Singh*.[8] The facts of both were on all fours

2. (1928) I.L.R. 53 B. 419.
4 (1908) I.L.R. 32 B. 577.
5. (1925) I.L.R. 47 A. 381.
7. (1925) I.L.R. 47 A 452.
8. (1926) I.L.R. 48 A. 592.
9. (1928) I.L.R. 50 A. 969 (F.B.).

with the present case. In *Jagmohan Agrahri* v. *Prag Ahir*[7] the father of a joint Hindu family sold a portion of the family property which was inconveniently situated and was not sufficiently profitable and employed the proceeds in extension of the family business which was not of a speculative nature, it was held that the transaction was legitimate and could not be upset by the sons. And in *Jado Singh* v. *Nathu Singh*[8] it was held that the term "benefit to the estate" may be held to apply to such a transaction as the sale of an *inconveniently situated*, incumbered and unprofitable property and the purchase in its stead, of the property which was undeniably a sound investment. But the Bombay High Court has dissented from both those rulings.

Then comes the Full Bench decision of the Allahabad High Court reported in *Jagat Narain* v. *Mathura Prasad.*[9] Their Lordships Justices Boys, Kendall and King after discussing all the previous rulings of its own High Court—for and against—and of the Privy Council referred above, and a few others, unanimously came to hold that in order to sustain an alienation of joint family property made by the managing member of the family, the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available at the time.

They were further pleased to hold that the transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are "of a defensive nature." *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonveree*[1] and *Palaniappa Chetty* v. *Sreemath Deivasikhamani*[3] were relied upon and *Shankar Sahai* v. *Bechu Ram,*[5] among others, overruled.

(This judgment was dated six months earlier than the date of delivery of *Ragho* v. *Zaga.*[2])

The Madras High Court too has adopted exactly the same view in the case of *Mahalakshmamma* v. *Ramaswami.*[11] Here the plaintiff sued to set aside the alienation of her immoveable property made by her mother which originally belonged to her deceased father. In the trial it came out that the land in question was sold because it was situated far away from *Kollur,* which was the plaintiff's mother's residence in order to buy better land in *Kollur*

1 (1856) 6 M.I.A. 393 2 (1928) I.L.R. 53 B 419
3. (1917) L.R. 44 I.A. 147: I.L.R. 40 M 709: 33 M.L.J. 1 (P C).
5 (1925) I.L.R. 47 A. 381 7. (1925) I.L.R. 47 A. 452
8 (1926) I.L.R. 48 A 592. 9 (1928) I.L.R. 50 A. 969 (F.B.)
11. (1926) 50 M L J. 651.

itself. Both the District Judge and Munsif found that the sale was valid and binding on the plaintiff because the lands sold were situated in an out-of-the-way village and yielded very little and because the object of the sale was, with the aid of the sale proceeds and some other money contributed by the plaintiff's mother, to purchase better land which was more convenient for cultivation. The High Court in appeal refused to set aside the alienation and held that if it is found that the estate has been improved by selling immoveable property and buying other lands of equal or greater value and more convenient for cultivation and management, the Courts will not set aside such alienation.

Though the facts in *Nagindas* v. *Mahomed Yusuf*[6] are not very opposite to those of the one under discussion, it is worthy of note that Justice Shah, after fully discussing the Hindu texts, has come to hold that the term "necessity" must not be strictly construed and the benefit to the family may under certain circumstances mean a necessity for the transaction.

Having discussed the above rulings, it is respectfully submitted that the decision of the Bombay High Court does not get support from the Privy Council ruling relied upon by it and *Shankar Sahai* v. *Bechu Ram*[5] followed by the learned Judges is no more good law in the face of the Full Bench decision in *Jagat Narain* v. *Mathura Prasad*[9] and the Madras High Court too has dissented from it in *Mahalakshmamma* v. *Ramaswami*.[11]

Now let me go further, and offer a few remarks on some other grounds put forth in the judgment in support of the decision under comment.

Justice Patkar, after handling the legal aspect of the case, came to decide that the transaction in suit was not for the benefit of the minor but was detrimental to his interests though the trial Judge, the first and the second appellate Courts had recorded findings contrary to it. The reasons that influenced his Lordship to come to that conclusion were, that the property sold was the minor's grandmother's property and thus otherwise immune from liability of any possible attachment against the father, that no sale-deed was secured from the vendor and a portion of the purchase money of the substituted lands remained yet to be paid, that complications might at any time arise to the minor later on, that *therefore* there was no necessity or benefit to the estate.

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5 (1925) I.L.R. 47 A 381

6 (1921) I L.R. 46 B. 312.

9 (1928) I.L.R. 50 A 969 (F.B.)

11 (1926) 50 M.L.J. 651.

Justice Murphy having put forth the facts and various considerations in favour of the alienation in suit most fairly and feeling the force of the argument and circumstances pressing on him, ultimately concurred with his learned brother remarking that "the argument is plausible, but I think all is not as fair as it sounds."

It is strange indeed that Justice Murphy should have failed to consider that the minor, as a matter of fact, had been greatly benefited by the transaction entered into on his behalf, in so far that better and more convenient lands were secured to him and that the yield of income to his share alone—from the mother's side—had enhanced more than fourfold, that he had actually enjoyed the benefit for full five years, that his guardian or manager or trustee, with whatsoever name he may be called, had exercised his discretion as any prudent owner would do, and that the purchaser had *bona fide* entered into the transaction and paid full consideration thereof, and that if there was any possible complication to arise therefrom to the minor, it was easily remediable by ordering actual partition of the property in this or another suit, and by getting entries made in the Record of Rights according to the shares of the father and son and thus guaranteeing the minor's position. But the learned Judge *thinks* that the transaction could not be maintained.

It is most noticeable that Mr. Justice Murphy was pleased to observe at the end of his judgment (vide *Ragho* v. *Zaga*[2] at p. 431) that

> "It is obvious on the one hand that one of the limits must be transactions of a speculative character, such as might possibly turn out profitably, but contain an appreciable element of risk. On the other hand, where there is a margin of income allowing of an improvement in the estate by the use of some of the surplus together with what might be raised by the sale of a small portion for the purpose of acquiring more property and extending the estate, a sale might possibly be justified,"

and simultaneously to issue a warning to the effect that

> "I am not laying down a rule but merely indicating circumstances which might justify the sale of a minor's estate by the guardian of his property"

One cannot understand the feasibility of such safeguards when there was not the least indication of speculative nature in the transaction in suit.

And lastly, it is very strange that both the learned Judges should have thought fit even not to allow just equities to the *bona fide* purchaser-respondent in the case.

See also the note in 58 M.L.J. (N.I.C.) 6.

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2 (1928) I.L.R. 53 B. 419.

SUMMARY OF ENGLISH CASES.

SWADLING *v.* COOPER, (1931) A.C. 1.

Negligence—Contributory negligence—What is—Motor collision on road—Nature of direction to jury.

The defendant was driving his car at 30 or 35 miles per hour along a main road. The deceased was proceeding on a motor cycle along a road which crossed the main road at right angles and the car and the cycle came into collision at the cross roads. The defendant gave due warning of his approach to the cross roads but the deceased did not appear to have given any warning. The distance from the defendant's car when he first became aware of the presence of the deceased to the spot of the collision was not more than 11 yards. The trial Judge sufficiently explained the law to the jury and asked them to find out "whose negligence was it that substantially caused the injury". The Court of Appeal ordered a new trial on the ground that the jury should have been told in plain terms "If you think the plaintiff was negligent but that the defendant, after the plaintiff was negligent, by taking reasonable care could have avoided him, such negligence of the plaintiff is not, as a matter of law, negligence which contributes to the accident so as to prevent the plaintiff from recovering."

Held, by the House of Lords, that a full discussion of the cases would be inappropriate in a summing up and would inevitably tend to confuse and bewilder the jury. In a summing up it is essential that the law should be correctly and fully stated. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The utmost limit of time between the moment when the defendant could have become aware of the deceased's approach and the moment of the impact was not more than one second. The brakes were applied at once. The crucial question on these facts was that put by the Judge and which the jury answered. Both were negligent, the defendant in approaching the junction at too rapid a pace and the deceased in the way he came out into the road and from the moment the parties became aware of their respective positions there can have been no time for the defendant to do anything to avoid the impact and therefore the negligence of each contributed to the collision.

GIRLS' PUBLIC DAY SCHOOL TRUST, LIMITED *v.* EREAUT, (1931) A.C. 12.

Income-tax—Day school carried on by a company—School open to public and in several respects a public school—Provision for payment of dividend to preference shareholders—If removes it from the category of public school.

A limited company owned and ran a day school for girls for education on moderate terms of girls of all classes. It was at all material dates open to the general public and the company could not exclude any would-be pupil except with the approval of the Public Education Authority; a large proportion of its pupils were scholars from the public elementary schools; a great proportion of its governing body was nominated by the Local Education Authority. The sole object of the Council which carried on the school was to maintain the school at the highest level of efficiency and the education provided was recognised by the Local Education Authority as being what is commonly called a public school education. The school was largely maintained by public moneys and in the view of the Board of Education the school satisfied the regulation which prohibits any parliamentary grant to a school conducted for private profit. The memorandum of association of the company authorised the company to apply part of the profits in paying a dividend to its preference shareholders and the company had been paying them a dividend also. The Commissioners found that the school was a public school and exempt from income-tax.

Held, the fact that the company is authorised to and does in fact apply part of the profits which it earns in paying a dividend to its preference shareholders does not necessarily prevent the school from being a public school. It is only an element for consideration. It is a question of fact in each case for the Commissioners to find and there was sufficient evidence to support their finding. The terms on which and the circumstances in which education is given are the determining factors.

Blake v. *Mayor, etc., of City of London,* (1886-7) 18 Q.B.D. 437; 19 Q.B.D. 79 and *Dilworth* v. *Commissioner of Stamps,* (1899) A.C. 99, explained.

It is not of the essence of a public school that there must be a perpetual foundation. Existence of a perpetual foundation, ownership or management by a public body are all only factors to be considered in determining the question as a fact.

SCOTT *v.* SUMMERLEE IRON COMPANY, (1931) A.C. 37.

Workmen's Compensation Act—Miner's nystagmus—Workman leaving employment and re-entering—False represen-

tation as to immunity from nystagmus at the time of re-entry—Whether re-entry is "entering the employment" within S. 43, sub-sec. (1) (*b*).

A miner and brusher was disabled by miner's nystagmus in 1924 when he was in the employment of certain other coal-masters. He entered the service of the respondents in 1926 and after a short period left their service. He again re-entered their service in April, 1927. In May he went to another section of the colliery and on that occasion he made a declaration in writing falsely and wilfully that he had at no time suffered from nystagmus. He left the service temporarily again and rejoined in November, 1927, when he again made a similar false declaration. He then worked till April, 1928. He left service and re-entered in June, 1928. On September 1, 1928, he was certified as disabled from miner's nystagmus as from 26th August, 1928.

Under S. 43, sub-sec. (1) of the Workmen's Compensation Act, 1925, where a workman is certified to be suffering from an industrial disease due to the nature of the employment in which the workman was employed at any time within twelve months previous to the date of the disablement, he shall be entitled to a compensation subject to the following modification in cl. (*b*) that if the workman has at the time of *"entering the employment"* wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable The question was whether the workman entered the employment in April, 1927, when he made no false representation or in November, 1927, when he re-entered and made the representation or in June, 1928, when he re-entered and made no representation.

Held, that the employment was not a continuous employment because the gap from July, 1927 to August, 1927, a time during which the workman was neither in actual work nor in contractual relation with the respondents makes it impossible to hold so. Same reasoning for the other gaps also. The "employment" referred to in S. 43 (1) (*b*) are the employments within 12 months previous to the accident and not the last employment and the expression "entering the employment" refers to the entering of employment at any time within the 12 months and as in November, 1927, he made a false declaration, he was not entitled to recover.

OFFICIAL ASSIGNEE OF THE ESTATE OF CHEAH SOO TUAN *v.* KHOO SAW CHEOW, (1931) A.C. 67.

Bankruptcy—Straits Settlements Bankruptcy Ordinance, S. 50—Conveyance by bankrupt within two years of bankruptcy —Onus *of proving good faith and consideration.*

Section 50, sub-section (1) of Straits Settlements Ordinance No. 44 provides that "any settlement of property, not being . . . a settlement made in favour of a purchaser . . . in good faith and for valuable consideration, ... shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the Official Assignee"; and by sub-section (3) " 'settlement' for the purposes of this section includes any conveyance or transfer of property . . . ."

Held, that the *onus* is on the Official Assignee to prove that a conveyance is not made in good faith and for valuable consideration. The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. But as the trial Judge has taken an erroneous view as to the law in regard to *onus* and his mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence, a new trial was ordered.

N. R. M. N. Ramanathan Chetty *v.* M. K. A. Meera Saibo Marikar, (1931) A.C. 77.

Ceylon—Roman-Dutch Law—Fiscal warrant—Wrongful seizure of goods—Liability to damages of person causing the seizure—Absence of malice.

The parties to the action were both of them creditors of a firm *N Company* carrying on business in tea in Colombo. The *N Company* filed a petition in insolvency in June, 1925. The respondent who had heard of the insolvency observed that a few days after insolvency tea was being removed from the Company's premises. The tea was being removed in pursuance of an agreement between the company and the appellant prior to insolvency whereby tea had been sold to him and in fact some tea was already removed and the remainder removed on the later date, so that the appellants were the owners of the tea in question. The respondent presented a petition to the Colombo District Court praying (amongst others) that the fiscal might be ordered to seize the goods specified in the petition at the respective places therein specified as having been deposited by the insolvent company and it referred to the appellant's store also. A search warrant was

issued and the fiscal executed it by entering the appellant's store and seizing the tea there, which was then not the property of the company but of the appellant. The respondent was the cause of the seizure. In an action for damages for wrongful seizure,

Held, that under the Roman-Dutch Law of Ceylon though the respondent acted in good faith and without malice, he was the cause of the appellant's property being wrongfully seized and that rendered him liable to damages. A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorised the seizure, the seizure is lawful and malice has to be proved. If, however, the writ or warrant did not authorise the seizure of the goods seized, action would lie without proof of malice.

YOUNG *v.* CANADIAN NORTHERN RAILWAY CO., (1931) A.C. 83.

Contract—Contract of employment—Wrongful dismissal of employee—Contract between parties silent—Agreement between employer and a labour organisation regulating right of dismissal—Employer observing those rules even with regard to plaintiff—If become part of the contract.

The plaintiff was engaged by a Railway Company as a machinist and all that passed when he was engaged was this. He saw *H* and signed an application for employment and *H* stated that he (plaintiff) would receive the going rate, the machinist's rate. The contractual obligation to observe seniority and not to dismiss him while retaining his juniors in service was not suggested from this but from the facts that (*i*) the company treated all employees alike, (*ii*) that as regards salary he was placed under "schedule" which meant the wage Agreement No. 4 (which was an agreement with a labour organisation which regulated the company's rights of dismissal), (*iii*) that he was placed on the seniority list, (*iv*) that in accordance with the agreement they gave him notice of dismissal, and (*v*) his complaint was referred to a committee in accordance therewith. The complaint was that he was dismissed in violation of those provisions and that therefore he was entitled to damages.

Held, that these matters cannot be treated as establishing contractual liability by the Railway Company to the plaintiff. The fact that the Railway Company applied the agreement to

him is equally consistent with the view that it did so, not because it was bound contractually to apply it to him, but because as a matter of policy it deemed it expedient to apply it at all. Also even the wage agreement is not adapted for incorporation with a service agreement but a contract between the labour organisation and the company. If the employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by the organisation against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.

LOCK *v.* BELL, (1931) 1 Ch. 35.

Contract—Contract for sale of plaintiff's interest in licensed premises—Time for payment of purchase money and delivery of possession on or about particular date—Earnest money paid—Forfeiture of, if vendee failed to perform in time—Time, if of the essence of the contract—Fixed sum of 200l. as damages—If a penalty.

By a contract, dated 19th October, 1928, between *L*, the licensee of a public house known as Thorns, and the defendant, *L* agreed to sell to him all her interest in the house for 1,200*l.* of which 120*l.* was to be paid into the hands of vendor's agents as stakeholders and the balance to be paid and possession was taken "on or about November 10, 1928." The said 120*l.* was to be earnest money which was to be forfeited in part of the ascertained damages of 200*l.* fixed in case of breach by either side. The sale was subject to acceptance of the defendant as tenant by the freehold brewers of the house. The freehold brewers consented to the sale and on the date of the sale nothing remained to be done save to pay the purchase price and take delivery of the premises. The defendant expected to sell some property of his and raise the money but at least a week before November 10th he knew that he would not find the money unless he could borrow it, as the negotiations for his sale had fallen through. The plaintiff extended the time for completion to December 8th. The plaintiff was ready to complete but even by that date the defendant failed to complete. In an action to recover the balance of 80*l.* damages,

Held, that December 8th was fixed as the result of a concession by the plaintiff to the defendant and with the defendant's consent, and that the defendant agreed to complete the purchase on that date. The contract is for the sale of the interest in a

public house which was being carried on by a widow who was exceedingly anxious to get rid of it, and the contract involves, of course, a transfer of the business as a going concern, the business being one which depends largely on the powers of management of the licensee. Stock is of a fluctuating kind, and the subject-matter of the contract is in its very nature exposed to daily variation and therefore time is "essential" in the contract. The fact that the contract is not for completion "on or before" but "on or about" November 10th does not make any difference.

Coslake v. *Till*, (1826) 1 Russ. 376, followed.

Held, further, that the sum of 200*l*. was in the nature of a penalty and could not be claimed.

Bradley v. *Walsh*, (1903) 88 L.T. 737, followed.

The deposit of 120*l*. was held forfeited and an inquiry into the damages suffered by reason of the breach ordered.

In re THE NATIONAL BENEFIT ASSURANCE COMPANY, LTD., (1931) 1 Ch. 46.

Company (Insurance)—Winding up—Participation agreements—No stamped policies under the agreements—Winding up of one company—Proof of alleged payments by the other company of premiums under the agreement—If admissible—Stamp Act, 1891, *Ss.* 92, 93 *and* 97*—Marine Insurance Act,* 1906, *S.* 84.

In 1920 *E* insurance company entered into a participation agreement with *L Y* insurance company for reinsurance under which the *E* Company was bound to cede and the *L Y* Company to accept a certain participation of all and every risk therein mentioned upon any marine insurance. The *L Y* Company was so entitled to a proportionate part of net premiums on the reinsured policies and the *E* Company to have certain commissions. A statement of account between the parties was to be rendered monthly by the *E* Company, and the balance in favour of the *L Y* Company were to be paid into a special account to be opened in the joint names of the parties. In 1921 the *L Y* Company was taken over by another Insurance Company, *N* Company, and in 1922 a new agreement (outward treaty) was entered into between the *E* Company and *N* Company on the same lines as the prior participation agreement, the *E* Company ceding to the *N* Company, and *N* Company accepting a participation of risks. In 1921 *N* Company entered into an inwards treaty

with the *E* Company, under which the *N* Company agreed to cede to the *E* Company, and the latter agreed to accept a share of all marine risks undertaken by *N* Company. It contained no provision for policies of insurance being issued, nor for particulars sufficient to enable the policies of reinsurance to be issued to satisfy the provisions of the Stamp Act, 1891. and of the Marine Insurance Act, 1906. No policies were in fact issued under the three agreements.

N Company was ordered to be wound up by the Court and the question arose if the *E* Company was entitled to prove in the liquidation for any sums paid by them for premiums under the outwards treaty.

Held, that the reinsurance treaty in question is invalid and void under Ss. 93 and 97 of the Stamp Act as also under the Marine Insurance Act. S. 84 of the Marine Insurance Act only applies where premiums have been actually paid by the assured to his insurer and not to a case like this where no premiums were actually paid but monthly statements of premiums and loss and quarterly statements of account are all that are provided for and the balance of account payable within 15 days after the account had been rendered and confirmed.

Even if they are treated as actual payments, the sections of the Stamp Act amount to an implied prohibition of each Act and therefore to an illegality on the part of the *E* Company, as the sections render the *E* Company liable to pay a penalty for each offence in paying or rendering himself liable to pay premiums in respect of unstamped sea insurances.

Bensley v. *Bignold,* (1822) 5 B. & Ald. 335; *Cope* v. *Rowlands,* (1836) 2 M. & W. 149 and *Brightman & Co., Ltd.* v. *Tate,* (1919) 1 K.B. 463, relied on.

The Barrow Mutual Ship Insurance Co. v. *Ashburner,* (1885) 54 L.J. (Q.B.) 377, distinguished.

Also apart from S. 84, the money cannot be recovered as on a total failure of consideration as the parties are in *pari delicto* and further the illegal agreement has been partially carried into effect.

T. M. FAIRCLOUGH & SONS, LTD *v.* BERLINER, (1931) 1 Ch. 60.

Landlord and Tenant—Two joint lessees—Action by lessor for recovery of possession based on forfeiture—One lessee alone praying to be relieved against forfeiture—Court, if can relieve.

Where the lessor brought an action to recover possession of demised properties against two defendants, who were joint lessees, on the ground that they neglected to perform certain covenants in the lease entailing forfeiture, one of the lessees appeared by a solicitor and asked for relief under S. 146, sub-sec. (2) of the Law of Property Act, while the other did not desire such relief, as he could not comply with the obligations under the leases.

Held, that where there are two or more lessees, one alone cannot apply to the Court for relief under S. 146. Unless the provision also enabled the Court in granting relief to absolve the other lessees from all future liability under the lease, the Court cannot give relief at the instance of one. The effect of granting relief is, according to *Dendy* v. *Evans,* (1910) 1 K.B. 263, to restore the lease as though it had never been forfeited and the result would be that the other lessees would continue to be liable under the onerous covenants in the lease. Even if the Court had such power, the Court would refuse it in its discretion.

In re HULTON. HULTON *v.* MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED, (1931) 1 Ch. 77.

Will—Construction—Gift of a clear sum after paying income-tax and super-tax—Surtax—If payable by the executors or the donee—Finance Acts, 1927 *and* 1928.

A testator by his will, dated 1924, declared that "out of the yearly income of my trust estate, my trustees shall pay to my said wife during her life such an amount as will give her a clear yearly sum of 12,000*l.* after paying or deducting income-tax and super-tax at the rates from time to time in force, but not as regards income-tax exceeding in the whole five shillings in the pound" subject to certain provisos. The testator died in 1925. In 1927 surtax was imposed in the place of super-tax by S. 38, Finance Act, 1927 and the question was if the annuitant was entitled to be paid 12,000*l.* free from the surtax.

Held, if the testator had simply directed his trustees to pay to his wife a clear yearly sum of 12,000*l.* after paying or deducting income-tax, the trustees would have clearly been bound to pay the surtax [In re *Crosse,* (1920) 1 Ch. 240]. In substance the surtax imposed by the Finance Act of 1928 is the

old super-tax in every essential feature disguised under a new name and therefore the same tax, and it would be defeating the clearly expressed intention of the testator to hold that the trustees of his will are not to pay the additional duty of income-tax merely because Parliament, for some reason, has given to the old super-tax the new name of surtax.

ATTORNEY-GENERAL *v.* SHARP, (1931) 1 Ch. 121.

Local Government—Licensing authority—Plying for hire omnibuses without license—Repetition of offence—If Attorney-General can move for injunction restraining the plying—Penalty under the Act, if the sole remedy.

The defendant, an owner or proprietor of motor omnibuses, was plying for hire his omnibuses without a license within the City of Manchester. The defendant had been convicted under S. 145 of the Manchester Police Regulation Act, 1844, and penalty imposed upon him under that section no less than forty-eight times, but these had no effect on him and he continued to act as he had done previously. The Attorney-General thereupon moved for an injunction restraining him from plying the omnibuses within the City of Manchester without a license.

Held, that the Attorney-General is entitled, quite apart from what might be called the individual remedy, to enforce the public rights which are enshrined in the Act by adequate proceedings for injunction, etc. The mere fact that the imposition of a fine is available under the Statute does not exclude the right of the Attorney-General to bring an action to prevent the infringement or threatened infringement of a public right if in his discretion he thinks it is a right course to follow.

Case-law discussed.

In re HARRIS, (1931) 1 Ch. 138.

Bankruptcy—Notice of bankruptcy petition—High Bailiff—Knowledge in his capacity as Registrar—If sufficient notice within S. 41, sub-sec. (2) of the Bankruptcy Act, 1914.

S Company obtained a judgment against *H* and proceeded to execution. On February 25th the High Bailiff *M*, whose business it was to levy execution, was paid out the decree amount and costs. Under S. 41, sub-sec. (2) *M* had to retain the sum so paid to him less execution costs for fourteen days as he was

also the "Sheriff" for the purposes of that section and under the Act if notice is served on him (Sheriff) within fourteen days (*i.e.,* March 11th) of a bankruptcy petition having been presented by or against the debtor and a receiving order is made, he (the Sheriff) shall pay the balance to the Official Receiver. *M* happened also to be the Registrar of the Court. On March 11th the debtor presented his own petition in this Court and the receiving order was made by *M* himself as Registrar. On March 12th the Official Receiver gave a formal notice to *M* of the bankruptcy petition and the receiving order. If that is the notice contemplated under the Act, it is beyond fourteen days and the Official Receiver could not claim it. The question was if the notice that *M* had as Registrar was sufficient to let in the Act and defeat *S.*

Held, that as the High Bailiff knew within the time, and knew by reason of the communication made to him by the debtor and by reason of something which took place in the debtor's presence, and was in fact effected by the High Sheriff himself in his capacity as Registrar, namely, the acceptance of the petition and the making of a receiving order, the Bankruptcy Act became fully operative to the knowledge of the High Bailiff and the Official Receiver was entitled to the money. There is no magic about "service"; the point is that the knowledge of the existence of the petition must reach the mind of the Sheriff.

WALTON HARVEY, LTD. *v.* WALKER AND HOMFRAYS, LTD., (1931) 1 Ch. 145.

Contract—Contract to permit electrically illuminated advertisement on defendant's buildings—The buildings acquired by local authority—Absence of condition exempting liability on acquisition—Condition if can be implied—Interest of advertisers in the buildings.

The defendants, lessees of a hotel in Manchester, entered into two contracts for the purpose of enabling the plaintiffs to exhibit for a term of years upon the roof of their hotel electrically illuminated advertisements and under them the plaintiffs were entitled to fix on the premises electric signs, etc., for the purpose. Before the expiry of that period, the Corporation compulsorily acquired the hotel and compensation paid to the defendants included a sum for the value of the rights of the defendants to receive the annual sums payable under these two

contracts during the unexpired periods thereof. The electric installations of the plaintiffs were all pulled down by the Corporation and in an action by the advertisers for damages against the hotel lessees,

Held, that the two contracts did not confer upon the plaintiffs any proprietary interest or estate in the hotel but only a personal obligation on the part of the defendants to allow the plaintiffs to fix and exhibit the electric sign, etc., that they did not even confer upon them sufficient interest to be entitled to compensation under the Land Clauses Act. But as the Manchester Corporation Act was passed in 1920, before the contracts were made and passed after notice to the lessees and occupiers of land, it cannot be said that the parties were ignorant of the provisions of the Act and the possibility of acquisition and therefore it is not possible to say that both parties must have made their bargain upon the footing that if the Manchester Corporation exercised their powers and took the hotel, the contracts were to be discharged. Cases where the power to acquire comes into being after the date of the contract distinguished.

In re FORREST: CARR *v.* FORREST, (1931) 1 Ch. 162.

Will—Codicil—Construction of—Gift by will to seven named legatees—Revocation under the codicil with regard to two—Effect of—Whether to be taken by the remaining five or intestacy.

A testatrix provided by her will that certain legacies should be paid out and further declared that the surplus remaining after payment of the legacies should be divided among seven named persons in a certain proportion. By a later codicil, however, she revoked the gift so far as two of them were concerned but confirmed the will in other respects. The question was if the shares in the ultimate residue to be given by the will to the two struck off persons ought to be treated as fallen into the residue and distributable accordingly between the five or ought to be treated as remaining undisposed of by the testatrix.

Held, that in the absence of any expressions in the will which lead to the result that the shares of residue revoked by the codicil should pass into the rest of their residue, the authorities establish that as to those shares there is an intestacy.

N

Sykes v. *Sykes,* (1868) L.R. 3 Ch. 301 and In re *Wilkins,* (1920) 2 Ch. 63 followed.

In re *Whiting,* (1913) 2 Ch. 1 doubted as irreconcilable with *Syke's* case.

WIMBLEDON AND PUTNEY COMMONS CONSERVATORS *v.* TUELY, (1931) 1 Ch. 190.

Corporation—Constituted by Act of Parliament—Power to Conservators to levy rates—Power to appoint officers and clerks for securing the execution of the Act—If implies power to pay pensions, annuities, etc.

A corporation constituted by an Act of Parliament to preserve the natural aspect and state of two commons at Wimbledon and Putney were empowered to do several acts to achieve that end and for the purpose of paying their expenses of management was entitled to levy rates, etc., on the tenants or occupiers of dwelling-houses within a certain radius of the commons. These rates were to be accumulated into a fund to be applied from time to time for the purposes of the execution of the duties under the Act. The corporation was empowered to employ officers and labourers on payments of such salaries and allowances as the Commissioners thought reasonable.

Held, that the corporation was empowered to make provision for their retiring employees also and a grant of pension or annuity was *intra vires* the corporation, notwithstanding the fact that no such power is expressly granted. Such an act is made only in furtherance of and for the efficient performance of the duties which the Act of Parliament throws upon them.

Cyclists' Touring Club v. *Hopkinson,* (1910) 1 Ch. 179, followed.

Observations of Keating, J., in *Marchant* v. *Lee Conservancy Board,* (1874) L.R. 9 Ex. 60, not followed as *obiter.*

In re STRATTON: KNAPMAN *v.* ATTORNEY-GENERAL, (1931) 1 Ch. 197.

Will—Charity—Bequest to "Vicar for the time being of the parish of Mortlake. . . . .to be by him distributed at his discretion among such parochial institutions or purposes as he shall select"—Validity.

A testatrix bequeathed the residue of the proceeds of sale of a house and a sum of 1000*l*. by two codicils to the "Vicar

for the time being of the parish of Mortlake . . . to be by him distributed at his discretion among such parochial institutions or (parochial) purposes as he shall select."

Held, that if a trust is to be constituted, it must be expressed in such terms as the Court, if appealed to, would be able to carry it out and it cannot give effect to a trust which is declared in loose words. The words of the codicils impose no restriction upon the activities to which the trust moneys might be applied nor is the Vicar's discretion in any way limited. In law it is not every parochial purpose which is a charity. There are many which are merely benevolent or humanitarian and as there are no words restricting the purposes to charitable, the gifts are invalid.

In re *Bain*, (1930) 1 Ch. 224, and In re *Barclay*, (1929) 2 Ch. 173, distinguished.

JOTTINGS AND CUTTINGS.

The Bishop of Birmingham's Case.—The advisers of the plaintiffs in *Notley* v. *Bishop of Birmingham* (*Times*, 11th instant), assisted by Mr. Justice Maugham, have found what appears to be a solution of the legal impasse created by the refusal of the Bishop to obey the order of Mr. Justice Bennett for the admittance of the Rev. F. D. Simmonds to the living of St. Aidan, Small Heath. The Bishop's action was based on Mr. Simmonds' refusal to undertake to abstain from a practice—the reservation of the sacrament—which the Bishop regarded as contrary to the doctrines of the Church of England. Fortunately, the High Court, unlike the Judicial Committee in the ecclesiastical cases which used to come before it, is not concerned with doctrine, but only with the legal right of the patrons of the living to have their nominee, if he is a fit person, duly admitted. The admittance, it seems, can be effected by the Archbishop of the Province, as well as the Bishop, and this alternative has been used to save the situation and render unnecessary any further process against the Bishop of Birmingham. Apparently the Archbishop of Canterbury will be willing to admit Mr. Simmonds. The law, of course, is impartial towards rival parties in the Church, and the age is not one in which these rivalries appeal to laymen generally. But for many sincere and earnest people they still have a real meaning, and even to others Browning's lines may give pause:

"All we have gained then by our unbelief
Is a life of doubt diversified by faith
For one of faith diversified by doubt."—*L.J.*, 1931, p. 109.

The Governor-General.—It is characteristic of our Empire—or, as we should now say, of our Commonwealth—that impordtant changes may be made in its Constitution by a mere stroke of the pen. Since the Imperial Conference met last year two Governors-General have been appointed by His Majesty. The Governor-General of Australia was nominated on the recommendation of the Australian Premier and his appointment expressly declared that fact. The choice of a Governor-General of the Senior Dominion—Canada—has now been made and announced without any statement that His Majesty had been advised by anybody. Perhaps the criticisms which were expressed in Australia with regard to the method of Sir Isaac Isaac's appointment may be the reason for this interesting omission. No one can say that the new Governor-General is the nominee of any party—although it may be assumed that His Majesty's Ministers in Canada were consulted. In neither case was the Secretary of State—so far as the appointments show—asked to advise; and thus the recommendations of the Imperial Conference receive tacit approval. It would be interesting to know whether the system of Royal Instructions, which all Governors have hitherto taken with them, has also undergone a silent change.—*L.J.*, 1931, p. 110.

Innkeepers and Cars.—A case of great importance to hotel proprietors, and of hardly less importance to the public, came before the Divisional Court in *Winkworth* v. *Raven* (reported at p. 119 *post*). The plaintiff had occasion to stay a night at the defendant's hotel in Northampton, in February, 1929, during a period of intense frost. His car was placed in the hotel garage, which was not artificially heated. The garage was apparently open on one side, and the plaintiff, recognising the risk of the water in the radiator of his car becoming frozen, himself drained the water out; but, either because this action was taken too late, or, more probably, we imagine, because on his particular car it was necessary to turn two taps to get rid of all the water, and he only turned one, some water was left, and this froze, causing considerable damage to the car. Thereupon the plaintiff brought his action and recovered damages, the County Court Judge holding that having paid for his car to be garaged, the plaintiff was entitled to have it satisfactorily protected against frost. One would have thought that

the fact that he had himself done what he thought was necessary to drain the radiator was evidence that he was not holding the hotel proprietor responsible for frost, but the learned Judge does not appear to have dealt with that point, though he held that the plaintiff had not been guilty of any negligence.—*L.J.*, 1931, p. 111.

Innkeepers as Insurers.—Not unnaturally, the proprietor of the hotel appealed, and the Divisional Court considered the rights of the parties in detail. The defendant, they held, was not to be considered, in the circumtances, as a warehouseman of the car, or as a garage proprietor. He was an innkeeper, and his responsibilities were those, and only those, of an innkeeper. As far as theft of a guest's goods is concerned, an innkeeper might be said to be an insurer; if they were stolen, it was for the innkeeper to show that he was not responsible. But so far as injury, whether to the guest himself, or to his goods, was concerned, the burden was on the guest to show negligence on the part of the innkeeper. It is well settled that an innkeeper is only bound to supply such accommodation for his guest and his goods as he in fact possesses; and the fact that the defendant's garage was unsuitable for garaging a car during a severe frost unless precautions were taken to prevent the water in the radiator from freezing was as well known to the plaintiff as to the defendant. In those circumstances, the Divisional Court held that the responsibility for protecting the car from damage was on the guest, and not on the innkeeper, and that the latter had not failed in any duty owed to the guest; and the appeal was accordingly allowed. This decision seems to be plainly right, and to accord not only with law, but with common sense; it would plainly be unjust that every proprietor of a small country inn should be under such a responsibility in respect of the cars of his guests as the plaintiff in this case sought to impose on the defendant.—*L.J.*, 1931, p. 111.

Lord Ellenborough.—By the death last week of the sixth holder of this title, memories of the first Lord Ellenborough, the great Chief Justice, are naturally revived. While at the Bar, one of the most notable cases in which he was engaged was the impeachment of Warren Hastings. Describing those briefed for the defence of the Indian Administrator, Macaulay says they were "men all of whom were afterwards raised by their talents and learning to the highest posts in their profes-

sion, the bold and strong-minded law, afterwards Chief Justice of the King's Bench; the more humane and eloquent Dallas, afterwards Chief Justice of the Common Pleas; and Plumer who, near twenty years later, successfully conducted in the same High Court the defence of Lord Melville, and subsequently became Vice-Chancellor and Master of the Rolls." In describing Law as "bold and strong-minded," Macaulay employed those epithets which exactly characterised Ellenborough and his conduct on the Bench. That he was a great lawyer is beyond question despite Campbell's remark to the friend who spoke of the uniform excellence of Ellenborough's judgments as enshrined in his (Campbell's) reports, namely: "I have a drawer full of Ellenborough's bad law"; but merely all contemporary observers of his career speak of his irascibility. Judges, even the greatest of them, are human; their patience is sometimes sorely tried, and so it is impossible not to feel a certain sympathy with the remark of Ellenborough to a too persistent advocate: "We sit here not to court argument but to endure it".

Perhaps something of the irascibility which has been alleged as a defect in the judicial character of the Chief Justice was in part accounted for by a deficient sense of humour, with a consequent inability to see the ludicrous side of things. Flaxman, the sculptor, used to relate a droll anecdote illustrative of this. Lord Ellenborough was at dinner at a friend's house when a little girl came into the room crying bitterly. Being asked the reason of her distress, she said, "Lord Ellenborough is dead," and at the same time held the cause of her affliction in her lap—a dead owl to which this venerable name had been profanely given. His Lordship, it was said, was greatly offended. The story goes that he left the table; but there were those of a cynical turn who declared that at all events dinner must have been over before he did so. If the Chief was somewhat lacking in a sense of humour, his son Charles Ewan Law, who became Recorder of London, was not without a perception of the ludicrous, of which an instance is preserved in the pages of Serjeant Robinson's "Bench and Bar." It seems that he and a certain under-sheriff, who was very diminutive but whose opinion of himself was in inverse ratio to his altitude, could never get on satisfactorily together. One day in Court the Recorder spoke rather sharply to the little man, who remonstrated against such treatment, and some altercation took place to which Law put an end by saying, *"De minimis non curat lex"*, surely one of the neatest applications of the familiar

maxim on record. Burke would have said of it, as he said of another apt witticism, that it was dignifying a pun.—*L.T.*, 1931, p. 100.

Quick Justice.—Paragraphs in the daily press have been commenting on the fact that in a recent case at the Old Bailey a man who committed a crime on the 4th January, was tried and sentenced on the 13th January, an example of the rapidity with which punishment may sometimes follow the crime. But it seems that this is not a record in the matter of swift retribution following on offence. A correspondent of *The Times* has recalled that Bellingham, the murderer of Spencer Perceval in 1812, was committed for trial on the 11th May, was tried on the 15th May, and was executed on the 18th May, which probably is a record, if we leave out of account what was jocularly known as Jeddart Justice. This phrase, which signified trial after execution, acquired a certain sinister renown in the old days of the Border raiders, when very short shrift was meted out to each other's opponents. In the introduction to the Border Minstrelsy, Sir Walter Scott has something to say about Jeddart Justice, and in a note he adds that "a similar proverb in England of the same interpretation, is Lydford Law, derived from Lydford, a Corporation in Devonshire, where, it seems, the same irregular administration of justice prevailed. A burlesque copy of verses on this town begins:

'I oft have heard of Lydford Law,
How in the morn they hang and draw,
And sit in judgment after'."

We often hear complaints of slowfooted justice, but no one has yet suggested a reversion to the procedure associated with Jedburgh and Lydford!—*L.T.*, 1931, p. 124.

Judicial Titles.—Last week a distinguished silk in the course of his argument before the Court of Appeal cited a passage from a judgment of "Lord Justice Sterndale," to be at once told from the Bench that there never was any such person. There was Lord Justice Pickford, who became Lord Sterndale and Master of the Rolls. The same counsel was also citing a decision of "Lord Justice Jessel," also an incorrect designation for Sir George Jessel never bore this title. Curiously enough, it is not so many years since Lord Sterndale had to point out to a member of the Bar who was citing a judgment of "Lord Justice Field", that there was no Judge bearing that

title; there was Mr. Justice Field, who, later, became Lord Field, but he never was a member of the Court of Appeal. These may be small matters, but accuracy is desirable here as elsewhere.—*L.T.*, 1931, p. 125.

Perjury Again.—McCardie, J., has not abandoned the subject of prejury. Since his much-discussed lecture (fully reported in our issue of the 3rd instant, at page 9), he has told a witness that people who talk about forgetfulness, lack of observation or inability to collect one's thoughts never try cases; a thing is either perjury or truth.

It is interesting to compare this observation with the conclusions drawn by Mr. Justice Alpers from his experience in New Zealand courts. He ascribes most false evidence to "inaccurate observation, unconscious bias, faulty memory", and in psychological phrase "obstructive association of ideas", not forgetting the partisan spirit engendered by an "aggressive, suspicious or bouncing" cross-examination.

He cites an interesting case of the prosecution of a publican for Sunday trading. His house was on a corner and it was alleged that he served customers who entered by a door in a side street. The zealous but obviously honest witnesses against him had watched from a house opposite. They agreed exactly as to the number of persons who had entered and left the premises. Nevertheless at the trial two independent surveyors proved by plans that the side door in question was not visible from the window where the watchers sat. They had counted the people who entered and left the side street and their enthusiasm had led them to state as observed fact an inference, natural enough but not conclusive.—*S.J.*, 1931, p. 80.

Judicial Legislation.—In his fascinating volume on "Law and Opinion in England", the late Professor Dicey devotes one of the chapters to the part played by judges in building up the fabric of the law. He says, "As all lawyers are aware, a large part, and, as many would add, the best part of the law of England is judge-made law—that is to say—consists of rules to be collected from the judgments of the Courts". Upon the same theme Professor Jenks has a good deal to say in the second fasciculus which he has just contributed to the "Studies of the International Academy of Comparative Law", issued by a German firm of publishers on behalf of the Academy, his

special subject being the "Sources and Judicial Organisation of English Law". Into the comparatively small compass of his contribution he has packed a remarkable amount of learning; and as he was writing not so much for English readers, but for foreign students, he has touched many points which the English student might easily overlook. Dealing with what Dicey called "judge-made law", he points out that though in theory all judgments of the superior courts are authoritative, in practice only those which are reported in one or other of the recognised reports are cited as authorities—an observation which reminds us of the remark of Burke, that "to give judgment privately is to put an end to reports; and to put an end to reports is to put an end to the law of England." With a quiet humour, the professor goes on, in dealing with "authorities," to say that "decisions generally believed to be inconsistent with the current of judicial opinion are apt to be 'distinguished' on slight grounds from the case under discussion. *A fortiori*, decisions which betray a misapprehension or forgetfulness of a well-known rule of law are lightly regarded. In one well-known decision a Vice-Chancellor flatly declined to follow a recent pronouncement of the Lord Chancellor, his official superior, remarking casually, that 'Even Lord Chancellors sometimes make mistakes.'" We assume that this temerarious observation of the Vice-Chancellor rests on tradition, for we have been unable to find it in the report of the case in question. Probably the reporter declined out of caution to give immortality to so seemingly heterodox a statement, although true enough in fact. Do we not remember that a more recent Lord Chancellor gravely stated, to the astonishment of Lincoln's Inn, that if you want to find a resulting trust you naturally look for it on the face of the document under construction? The whole of Professor Jenks' monograph makes pleasant reading, and an added value is given to it in the eyes of foreign students by the very full and accurate bibliography of current statute law, law reports, and legal journals of the British Empire which has been compiled by Mr. Arthur Hewitt, the Assistant Librarian of the Middle Temple.—*S.J.*, 1931, p. 85.

Sentence of Outlawry.—It almost savours of a return to the dark ages to hear of a sentence of outlawry being pronounced by a British Court. Yet this was done in the Court of Justiciary in Scotland recently. What is meant by such a sentence and in what circumstances is it pronounced? Taking the latter half of the question first, we find that Baron Hume, in his

"Commentaries on the Law of Scotland respecting Crimes," says that "although our law justly refuses to take any step towards the trial of anyone in his absence, it is, however, very necessary on the other hand, that we should have some means of compelling to appear, or of driving out of the country, those wicked and dangerous persons who abscond owing to consciousness of their guilt. Our expedient for this purpose is sentence of fugitation or outlawry, which passes against the accused, on his absence at the diet of his libel, and is attended with the forfeiture of his person in law." In other words, and put more shortly, the sentence of outlawry is imposed where the person indicted fails to appear. Turning next to the consequences which follow the pronouncement against an accused person of the sentence of outlawry, Hume, as we have seen, says that it involves "the forfeiture of his person in law," which means that "he cannot bear testimony on any occasion, or hold any place of trust, or even pursue or defend in any process, civil or criminal, or claim any personal privilege or benefit whatsoever of the law." It might seem fairly evident that a person who has failed to appear to answer a grave charge preferred against him on indictment and has thereupon been declared an "outlaw", would not be likely to desire to give evidence in any other proceeding or put in an appearance to pursue or defend any process. To be thus precluded from doing things which *ex hypothesi* he would not be desirous of doing would, therefore, seem no great hardship, but the sentence may involve more than a mere deprivation of privileges, for the old law that outlawry may be followed by certain forfeitures of goods and profits from lands is still apparently in force. Moreover, the sentence of outlawry may be, and usually is, followed up by the Crown obtaining what are called letters of caption against the accused upon which he may be imprisoned if he is found within the Kingdom, and if he is thus arrested and imprisoned he is not bailable whatever the nature of his offence may have been. A person who has been declared an outlaw may however petition the Court to "repone" him against the sentence in order that he may stand his trial, and there have been several cases in which this has been done, one as recently as 1894.—*S.J.*, 1931, p. 86.

Doctor Johnson on "Ecclesiastical Patronage."—The recent discussion in the Church Assembly, and particularly the vigorous denunciation by the Bishop of Durham of "patronage trusts," serve to recall what Dr. Samuel Johnson, the great lexico-

grapher, had to say about the origin of private patronage Johnson, as is well-known, was a devout churchman. "Public worship," he told Boswell "required a public place; and the proprietors of lands as they were converted, built churches for their families and their vassals. For the maintenance of ministers they settled a certain portion of their lands; and a district through which each minister was required to extend his care, was, by that circumscription, constituted a parish. The churches which the proprietors of lands had thus built and thus endowed, they justly thought themselves entitled to provide with ministers; and where the episcopal government prevails the Bishop has no power to reject a man nominated by the patron, but for some crime that might exclude him from the priesthood: for, the endowment of the church being the gift of the landlord, he was consequently at liberty to give it according to his choice to any man capable of performing the holy offices. The people did not choose him because the people did not pay him." To-day we have many churches built and maintained not by individuals, but by congregations. There, of course, the case is different; and as, moreover, very few churches erected by private landowners are now maintained except by their congregations, the patronage question has assumed quite a different aspect. None the less it is always interesting to recall the perfectly reasonable and proper origin of customs which are being gradually abolished in these modern days.—*S.J.*, 1931, p. 126.

Law and Letters.—In an address, full of charm and phrased with an exquisite felicity, which Lord Macmillan delivered to the American Bar Association at their meeting in Chicago last autumn, and which is now accessible to English readers in the pages of the current number of the *Judicial Review,* stress is laid upon the obligation incumbent upon the lawyer as a member of a learned profession to cultivate an intimate acquaintance with the well of English undefiled in the classics of our noble language. As Lord Macmillan says, "there is no reason why legal arguments or judicial judgments should not be expressed in good English. There is every reason why they should. The advocate who can impart a literary flavour to his address adds to its persuasiveness and attraction." This is a very different attitude from that adopted by one of the Lords of Session in former days of whom Boswell tells us in his "Life of Dr. Johnson". It seems that Boswell had taken literary counsel with the doctor while preparing a written argument to be laid before the Court of Session, but all the trouble he had incurred

would appear to have been thrown away so far as this particular judge was concerned, as he subsequently told Boswell that he need take no pains in the preparation of such papers for it was merely a case of "casting pearls before swine." No doubt the remark was made jocosely, but it was scarcely in its form complementary to the intellectual equipment of the members of the Bench. Needless to say, Lord Macmillan, who has a hereditary love of letters and has himself the pen of a ready writer, will have none of this. In his view it is essential that the lawyer, if he is to attain efficiency in his calling "should be steeped in literature, and keep his mind constantly refreshed and renewed by contact with the great thinkers of the past." No better counsel than this can be given to him who is entering the profession, and well will it be if to it he gives heed.—*S.J.*, 1931, p. 126.